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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 414

TOM S. BUMGARNER, ET AL.,
Petitioners,

VERSUS

JOE BROWN COMPANY, INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0090

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In the
Supreme Court of the United States
OCTOBER TERM, 1967

No. .....

TOM S. BUMGARNER, ET AL.,
Petitioners,

VERSUS

JOE BROWN COMPANY, INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

1. This case has been reported in *Bumgarner* v. *Joe Brown Company*, 376 F.2d 749 (10th Cir. 1967). See appendix i-iv for the text of the court's opinion.

2. Petitioners bring this action to recover from respondent unpaid overtime compensation due to the petitioners under the provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, as amended 63 Stat. 910, U.S.C., Title 29, § 201 *et seq.*). Jurisdiction of this action is conferred upon the Court by § 16(b) of the Fair Labor Standards Act [29 U.S.C. § 216(b) Vol. 7 p. 6372, 28 U.S.C. §§ 1337 Vol. 7 p. 5967 and 1345 Vol. 7 p. 5969]. Summary judgment was rendered by the United States District Court for the Eastern District of Oklahoma in favor of the respondent on March 10, 1966, which was

affirmed by the United States Court of Appeals, 10th Circuit, in the March term of 1967, and was filed by that court on April 24, 1967. See appendix for the text of the above cited statutes and court orders and opinions. The United States Supreme Court has jurisdiction of this cause by virtue of the provisions of 28 U.S.C. § 2101(c). See appendix for the text of the statute.

3. Questions for consideration by this Court are:

   A. Whether there was any genuine issue of material fact before the United States District Court for the Eastern District of Oklahoma.

   B. Whether petitioners were exempt from the overtime compensation provision of § 7 of the Fair Labor Standards Act, 29 U.S.C. § 207, by virtue of 29 U.S.C. § 213(b)(1).

4. The statutes governing this case are:

   A. 29 U.S.C. § 207, Vol. 7, p. 6317;

   B. 29 U.S.C. § 213(b)(1), Vol. 7, p. 6324;

   C. 49 U.S.C. § 304, Vol. 10, p. 9233;

   D. 29 U.S.C. § 202, Vol. 7, p. 6310.

   See appendix for the text of the above cited statutes.

5. The facts in this case are that petitioners were employed as truck drivers for the respondent at various times during each work week between April 1, 1963, and October 31, 1964.

(a) Respondent Joe Brown Company, Inc., employed petitioners as truck drivers during each work week as follows, to-wit: Tom S. Bumgarner, between April, 1963 and October, 1964; Jacky W. Casey, between July, 1963 and

October, 1964; Jerry D. Casey, between April, 1964 and October, 1964; Danny T. Chronister, between April, 1963 and April, 1964; Don Helton, between August, 1963 and October, 1964; Jimmy D. King, between April, 1963 and October, 1964; Bill Roper, between April, 1963 and October, 1964; Homer M. Teffertiller, between May, 1963 and October, 1964; Marvin L. Vernon, between April, 1963 and October, 1964; J. C. Warren, between April, 1963 and October, 1964; John T. Tulley, between July, 1963 and October, 1964; Douglas Wood, between April, 1963 and December, 1963; Edward W. Wells, between April, 1963 and October, 1964. Throughout the period of their employment, as aforesaid, petitioners were regularly and customarily engaged in the receiving, handling, shipping, billing, recording, production, transportation and delivery of material which was used in interstate commerce within the meaning of the Fair Labor Standards Act.

(b) During each of the work weeks within said period, respondent employed the petitioners in the shipping, production, delivery and transportation of material which was used in interstate commerce within the meaning of the Fair Labor Standards Act for work weeks longer than forty hours, and failed and refused to compensate petitioners for such employment in excess of 40 hours in such work weeks at a rate of not less than one and one-half (1½) times the regular rate at which they were employed, contrary to Section 7 of the Fair Labor Sandards Act.

(c) As a result of said violations of Section 7 of the Fair Labor Standards Act by respondent, there is due and owing from the respondent the following sums, to-wit: To

Thomas S. Bumgarner, the sum of $1,640; to Jacky W. Casey, the sum of $1,060; to Jerry D. Casey, the sum of $502; to Danny T. Chronister, the sum of $920; to Don Helton, the sum of $1,052; to Jimmy D. King, the sum of $1,460; to Bill Roper, the sum of $1,250; to Homer M. Teffertiller, the sum of $1,243; to John T. Tulley, the sum of $1,147; to Marvin L. Vernon, the sum of $1,440; to J. C. Warren, the sum of $1,300; to Douglas Wood, the sum of $530; to Edward W. Wells, the sum of $1,430, which amount has been demanded of the respondent and remains unpaid.

6. Petitioners filed their first amended complaint setting forth their claims with the United States District Court for the Eastern District of Oklahoma on November 30, 1965. On March 10, 1966, the District Court sustained respondent's motion for summary judgment and petitioners appealed to the United States Circuit Court of Appeals for the 10th Circuit which sustained the ruling of the District Court.

7. Jurisdiction was conferred upon the United States District Court for the Eastern District of Oklahoma by Section 16(b) of the Fair Labor St ndards Act [29 U.S.C. § 216(b)] and by 28 U.S.C. §§ 1337 and 1345.

ARGUMENT

PROPOSITION I

THE JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS SUSTAINING THE DECISION OF THE DISTRICT COURT GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IS ERRONEOUS BECAUSE THERE IS A GENUINE ISSUE AS TO A MATERIAL FACT.

A summary judgment may only be granted in favor of one party when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A. Since the petitioners have denied under Rule 56(f) the facts as set forth in respondent's affidavit in support of defendant's Motion for New Trial, there is a genuine issue as to a material fact and respondent's Motion for Summary Judgment should have been denied. *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 71 L.Ed.2d 458, 82 S.Ct. 486.

PROPOSITION II

THE PETITIONERS ARE ENTITLED TO OVERTIME COMPENSATION UNDER THE PROVISIONS OF SECTION 7 OF THE FAIR LABOR STANDARDS ACT 29 U.S.C. § 207.

Apart from 29 U.S.C. § 213(b)(1), it is clear that petitioners are subject to the wage and hour provisions of the Act. Therefore the question is whether the exemption relied upon by respondent is applicable to the present case.

A.

The construction placed upon legislation by courts should give effect to the intent of Congress. *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 84 L.Ed. 1345,

60 S.Ct. 1059 (1940). The Fair Labor Standards Act was designed to extend the frontiers of social process by insuring to all able-bodied working men and women a fair day's pay for a fair day's work, and any exemption from such humanitarian and remedial legislation must be narrowly construed. We are dealing with legislation that is dedicated to the proposition that laboring men are to be treated as something more than chattels. Justice Murphy dissenting in *Morris* v. *McComb*, 332 U.S. 422 (1947).

Any exemptions, including exemptions concerning the payment of overtime compensation, from humanitarian and remedial legislation such as the Act, must be narrowly construed against the employer, giving due regard to the plain meaning of the statutory language and the intent of Congress. *A. H. Phillips, Inc.* v. *Walling*, 325 U.S. 490, 493, 89 L.Ed. 1095, 1098, 65 S.Ct. 807, 157 A.L.R. 876; *O'Meara-Sterling* v. *Mitchell*, 299 F.2d 401-403 (5th Cir. 1962); *Mitchell* v. *Stinson*, 217 F.2d 210, 214 (1st Cir. 1954); *Tobin* v. *Johnson*, 198 F.2d 130, 133 (1952), *cert. denied* 73 S.Ct. 726, 345 U.S. 915, 97 L.Ed. 1349 (1953). Therefore, the exemption relied upon by defendant under Title 29 U.S.C.A. § 213(b)(1) must be plain and unmistakable, giving due regard to the rule that exemptions from the operation of humanitarian legislation are to be narrowly construed against the employer. Also, see 29 U.S.C. § 202, Vol. 7, p. 6310, which expresses the Congressional intent in passing the Fair Labor Standards Act.

B.

It is not clear, nor plain, nor unmistakable that the exemption under 29 U.S.C.A. § 213(b)(1) should be applied

in this case. On the other hand, the said exemption should not be applied in the present controversy because the petitioners' activities do not affect the safety of operation of motor vehicles engaged in interstate commerce. These facts were never demonstrated by the respondent. The Interstate Commerce Commission's power, under 49 U.S.C. § 304(a) is confined to regulation of transportation in interstate and foreign commerce, and its jurisdiction over employees' activities is limited to those which affect the safety of operation of motor vehicles engaged in such transportation. Justice Murphy dissenting in *Morris* v. *McComb, supra,* and *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 84 L.Ed. 1345, 60 S.Ct. 1059 (1940). When 29 U.S.C.A. § 213(b)(1) speaks of those over whom the Interstate Commerce Commission has "power," it means those who perform at least substantial amounts of activities within the Commission's jurisdiction. Congress was not concerned with insignificant conflicts between the Fair Labor Standards Act regulations and the Interstate Commerce Commission regulations. Nor was it desirous of leaving unregulated nearly all of the working time of those who are engaged in the production of goods for commerce but who spend infinitesimal amounts of time directly in interstate transportation. Justice Murphy's dissent in *Morris* v. *McComb, supra.*

In support of his position, respondent in arguing this cause to the United States Court of Appeals, 10th Circuit, relied upon the case of *Morris* v. *McComb, supra,* which petitioners contend is not controlling in the present controversy. In *Morris* v. *McComb* the Court found that the exemption under 49 U.S.C. § 304 was applicable because

the individual drivers, who were plaintiffs, spend approximately 4 per cent of *their* time and efforts in interstate commerce. No mention was made by the respondent in the present controversy at any time of how much time, if any, was spent in interstate transportation by the individual petitioners herein, so as to bring the case within the ruling of *Morris* v. *McComb, supra.* The only fact mentioned by respondent was that more than 4 per cent of respondent's revenues were derived from transportation as a common carrier in interstate commerce.

Therefore, petitioners contend that the United States Supreme Court is presented with the question which has not been, but should be, settled by the Supreme Court. Petitioners also contend that the United States Court of Appeals, Tenth Circuit, has misconstrued the Supreme Court's ruling in *Morris* v. *McComb, supra.*

Petitioners further contend that the majority decision in *Morris* v. *McComb, supra,* was incorrectly decided and is contrary to the intent of Congress in passing the Fair Labor Standards Act as set forth above, and in support thereof, cite the dissenting opinion of Justice Murphy in *Morris* v. *McComb, supra.*

In summary, the United States Court of Appeals erred in sustaining the decision of the District Court which granted respondent's Motion for Summary Judgment because there is no statutory authority allowing a Motion for Summary Judgment when there is a genuine issue as to a material fact.

To hold that the petitioners were exempt from overtime compensation under the Act would be to ignore the

principal that the construction placed upon legislation by courts should give effect to the intent of Congress.

Respectfully submitted,

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July, 1967

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
APR 24 1967
WILLIAM L. WHITAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term, 1967

TOM S. BUMGARNER, JACKY W. CASEY, JERRY D. CASEY, DANNY T. CHRONISTER, DON HELTON, JIMMY D. KING, BILL ROPER, HOMER M. TEFFERTILLER, JOHN T. TULLEY, MARVIN L. VERNON, J. C. WARREN, DOUGLAS WOOD, and EDWARD W. WELLS, Appellants.	)	No. 8745
vs.	)	
JOE BROWN COMPANY, INC. a corporation, Appellee.	)	

Appeal from the United States District Court
for the Eastern District of Oklahoma

Ben T. Lampkin and Ed abel (Lampkin, Wolfe & Sokolosky and Jerry Sokolosky on the brief) for Appellants.

William D. Curlee (Lytle Soulé & Emery on the brief) for Appellee.

Before PICKETT, LEWIS and HICKEY, Circuit Judges.
LEWIS, CIRCUIT Judge.

[APPENDIX]

Appellants, plaintiffs below, seek relief from an adverse and summary judgment entered by the District Court for the Eastern District of Oklahoma. Claim is made that the case was not ripe for summary consideration and that the judgment is erroneous as a matter of law. We find no merit to either contention and affirm the judgment.

Appellants were employed as truck drivers by the appellee company and, by their amended complaint, made claim for alleged unpaid overtime wages due under the provisions of section 7 of the Fair Labor Standards Act, 29 U.S.C. § 207. The Company responded by way of motion for summary judgment, Rule 56(b), Fed. R. Civ. P., supported by an affidavit of the company's president which in substance alleged:

> That the Joe Brown Company, Inc. was engaged in the general cartage business as a contract and common carrier by motor vehicle; that at all pertinent times more than four percent of the company's total revenues were derived from transportation moving directly in interstate commerce between the states of Oklahoma and Texas; that all of the plaintiff-employees were full-time employees and the assignments for such work were made indiscrimnately to the company drivers; and that the company had never sought nor obtained a certificate of exemption under the Motor Carrier Act, 49 U.S.C. § 304.

The appellee company concluded a right to summary judgment under section 13(b)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(b)(1), which provides:

> "The provisions of section 207 of this title [section 7 of the Act] shall not apply with respect to—
>
> (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49."

In opposition to the motion for summary judgment, counsel for appellants filed his personal affidavit expressing his belief that the facts set forth in appellee's affidavit were not true and also stating his inability, from lack of knowledge, to set forth counter allegations of fact.

Appellants' counter-affidavit was clearly insufficient to dispute the factual allegations contained in appellee's affidavit. Neither conclusionary allegations nor general denials perpetuate an issue of fact under Rule 56, and if such undisputed facts effectively pierce the sham of false generality of claims, the case is ripe for summary disposition. Wagoner v. Mountain Savings & Loan Ass'n, 10 Cir., 311 F.2d 403; Dressler v. MV Sandpiper, 2 Cir., 331 F.2d 130, 132-35; Notes of the Advisory Committee on Rules, Rule 56(e), 28 U.S.C.A. Nothing contained in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, is to the contrary and appellants' reliance thereon is misplaced.

Since appellants claim that they worked more than forty hours per week on many occasions, they were clearly entitled to relief under the Fair Labor Standards Act unless they were "exempt employees" under that Act. In granting summary judgment the trial court noted that such point of law had been directly considered and decided by the Supreme Court in Morris v. McComb, 332 U.S. 422, wherein against an almost identical factual background it was held that truck drivers directly engaged in hauling in interstate commerce, although such activity constituted but a small part of the employees' work and resulted in less than four per cent of company revenue, were without remedy under the Fair Labor Standards Act for overtime pay. We agree that the decision is controlling here. Appellants assert that *Morris* is bad law, a claim that this court will not consider, and attempts to distinguish the case as applicable only when the *individual* drivers are engaged in interstate commerce, a fact not asserted in the affidavit of appellee. The case cannot be so distinguished either in reasoning or, apparently,

in fact, for Mr. Justice Rutledge states in his dissent in *Morris* that the case "goes so far as to exclude from the Fair Labor Standards Act's protection at least two employees who made no trips in what petitioner regards as the interstate phase of his business." 332 U.S. at 440.

The judgment is affirmed.

29 U.S.C. & 216(b). Any employer who violates the provisions of § 206 or § 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Actions to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for or in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and; such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by defendant, and costs of the action. The right provided by this section to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under § 217 of this title, in which restraint is sought of any further delay in the payment of unpaid minimum wages or amount of unpaid overtime compensation, as the case may be, owing to such employee under § 206 or 207 of this title by an employer liable therefor under the provisions of this subsection.

28 USC § 1337: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[APPENDIX]

FILED
MAR 10 1966
JOHN B. FINK
CLERK, U.S. DISTRICT COURT
By ----------
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

Tom S. Bumgarner, Jacky W. Casey, Jerry D. Casey, Danny T. Chronister, Don Helton, Jimmy D. King, Bill Roper, Homer M. Teffertiller, John T. Tulley, Marvin L. Vernon, J. C. Warren, Douglas Wood, and Edward W. Wells,	)	No. 5921-Civil
Plaintiffs,	)	
v.	)	
Joe Brown Company, Inc., a corporation,	)	
Defendant.	)	

ORDER

Tom S. Bumgarner and others, by their amended complaint, claim unpaid overtime wages, together with liquidated damages, attorney's fees, and costs, under the provisions of the Fair Labor Standards Act (29 U.S.C. 201 et seq.) for work performed, as employees of the Joe Brown Company, Inc. The defendant has filed a motion for summary judgment, and a motion to dismiss which the court treats as a motion for summary judgment, and as grounds therefor asserts that the employment activities of the plaintiffs were subject to regulation by the Interstate Commerce Commission under the provisions of the Motor Carrier Act 49 U.S.C. 304) and therefore exempt from the maximum hours provisions of the Fair Labor Standards Act.

At a hearing on February 10, 1966, to determine whether there existed a genuine issue as to any material

fact, the court requested the defendant to submit a statement of the material facts deemed undisputed and the plaintiff thereafter to admit or deny the same. This was done in the form of correspondence to the court, and from these statements, statements made at the hearing, and statements contained in the complaint, it appears that the determinative facts, about which there is no dispute between the parties, are as follows:

1. At all times for which overtime compensation is claimed in this action the plaintiffs were employed as truck drivers by the defendant company at its place of business at Davis, in the Eastern District of Oklahoma.

2. The defendant's sole business at Davis was the transportation of rock, sand, and lightweight aggregates, and included the hauling of such materials for others for hire. The full-time employment of the plaintiffs as truck drivers was in the transportation of such materials.

3. At least part of the materials transported by the plaintiffs as truck drivers for the defendant company was used in interstate commerce within the meaning of the Fair Labor Standards Act, and a small portion of the materials was transported by the defendant company for others for hire, with the plaintiffs driving the trucks, directly in interstate commerce between Oklahoma and Texas. The interstate trips were distributed generally and indiscriminately among the defendant's drivers, including the plaintiffs, along with driving assignments in the transportation of materials other than directly in interstate commerce, and were a regular, integral part of the transportation services furnished by the defendant to others.

4. Between one and two percent of the defendant company's revenue from all sources, including revenue from unrelated businesses at other locations, was derived from the transportation of materials for others for hire directly in interstate commerce in continuous movements between Oklahoma and Texas.

5. The defendant has never obtained or sought a certificate of general exemption from compliance with the Motor Carrier Act, it has never been subject to actual regulation by the Interstate Commerce Commission, and it has never had a certificate or permit from the Interstate Commerce Commission authorizing it to engage in interstate hauling.

The defendant in its statement described its operation at Davis, Oklahoma, as a cartage business and as that of a common carrier, with which the plaintiffs take issue, but the court regards these as descriptive terms only and not determinative.

There is no question but that except for the exemption provision of the Fair Labor Standards Act (29 U.S.C. 213b1), the plaintiffs' employment would be subject to the maximum hours provision (Section 207). Nor is there any genuine issue as to a material fact necessary to determine whether the exemption provision is applicable. The defendant bases its case squarely upon the proposition that its interstate hauling is sufficient to bring the activities of the plaintiffs in their employment as truck drivers within the regulatory power of the Interstate Commerce Commission, and beyond the reach of the Fair Labor Standards Act with respect to their hours of work, even though it represents a source of revenue of virtually insignificant proportions. The court is forced to agree. In Morris v. McComb, 332 U.S. 422, a case involving interstate shipments representing from three to four percent of the total business, the Supreme Court held that where the truck drivers were used indiscriminately by the employer for the interstate shipments, their activities were not subject to the overtime requirements of the Fair Labor Standards Act. The case is squarely in point, and is controlling.

The court finds, therefore, that the overtime activities of the plaintiffs is subject to regulation by the Interstate

Commerce Commission and exempt from the application of 29 U.S.C. 207. Accordingly.

IT IS BY THE COURT ORDERED that the defendant's motion for summary judgment be and the same hereby is granted and judgment is entered in favor of the defendant and against the plaintiffs, and this action is dismissed.

EDWIN LANGLEY
District Judge

TWENTY-SEVENTH DAY, MARCH TERM, MONDAY, APRIL 24th, 1967.

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable John J. Hickey, Circuit Judges.

Tom S. Bumgarner et al., Appellants,	)	
8745 vs.	)	Appeal from the United State District Court for the Eastern District of Oklahoma.
Joe Brown Company, Inc., a corporation, Appellee.	)	

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

A true copy
Teste
/s/ William L. Whittaker
William L. Whittaker
Clerk, U.S. Court of
(SEAL) Appeals, Tenth Circuit

STATUTES

28 USC § 210(c): "any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or deceee. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days."

§ 207. Maximum hours

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; and

(2) No employer shall employ any of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 203(s) (1) or (4) of this title, or by an establishment described in section 203(s) (3) of this title, and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this subsection, or (ii) is brought within the purview of this subsection by the amendments made to section 213 of this title by the Fair Labor Standards Amendments of 1961—

(A) for a workweek longer than forty-four hours during the third year from the effective date of the Fair Labor Standards Amendments of 1961,

(B) for a workweek longer than forty-two hours during the fourth year from such date,

(C) for a workweek longer than forty hours after the expiration of the fourth year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee un-

der subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) of this section shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a) of this section, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount ofthe payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,[1] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

(e) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate ir-

regular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (which ever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(f) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona filed rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially

equivalent to the average hourly earning of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1)-(7) of subsection (d) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be in-included in computing the regular rate.

(g) Extra compensation paid as described in paragraphs (5)-(7) of subsection (d) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(h) No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. June 25, 1938, c. 676, § 7, 52 Stat. 1063; Oct. 29, 1941, c. 461, 55 Stat. 756; July 20, 1949, c. 352, § 1, 63 Stat. 446; Oct. 26, 1949, c. 736, § 7, 63 Stat. 912; May 5, 1961, Pub.L. 87—30, § 6, 75 Stat. 69.

1 So in original. Probably should have closed parentheses.

USC § 213(b)(1) "The provisions of § 207 of this Title shall not apply with respect to—(1) Any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum of hours of service pursuant to the provisions of § 304 of Title 49;"

§ 304. Powers and duties of Commission—Powers and duties generally

(a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title.

(3a) Notwithstanding any other provision of section 303(b) of this title, to establish for carriers of migrant workers by motor vehicle reasonable requirements with respect to comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment. Such requirements shall apply to any such carrier only in the case of transportation of any migrant worker for a total distance of more than seventy-five miles,

and then only if such transportation is across the boundary line of any State, the District of Columbia, or Territory of the United States, or a foreign country. When such requirements are established, the term "motor carrier" shall be construed to include carriers of migrant workers by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f) and (g), and 324 of this title.

(4) To regulate brokers as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to licensing, financial responsibility, accounts, records, reports, operations, and practices of any such person or persons.

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this chapter, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to

become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this chapter beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this chapter as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Applications under this subparagraph shall be made in writing to the Commission, verified under oath, and shall be in such form and contain such information as the Commission shall by regulations require.

(5) For the purpose of carrying out the provisions pertaining to safety, the Commission may avail itself of the assistance of any of the several research agencies of the Federal Government having special knowledge of any such matter, to conduct such scientific and technical researches, investigations, and tests as may be necessary to promote the safety of operation and equipment of motor vehicles as provided in this chapter; the Commission may transfer to such agency or agencies such funds as may be necessary and available to make this provision effective.

(6) To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

(7) For purposes of the administration of the provisions of this chapter, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation as the Commission may deem necessary.

CLASSIFICATION OF MOTOR CARRIERS

(b) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such

carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this chapter, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

INVESTIGATION OF COMPLAINTS; ORDERS

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

APPLICATION OF SECTIONS 14 AND 16(13) OF THIS TITLE

(d) The provisions of sections 14 and 16(13) of this title, relating to reports, decisions, schedules, contracts, and other public records, shall apply in the administration of this chapter.

REGULATIONS GOVERNING USE OF VEHICLES OWNED BY OTHERS

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be

signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

EXCEPTIONS TO REGULATIONS FOR USE OF VEHICLES OWNED BY OTHERS

(f) Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use—

(1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a) (17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b) (6) of this title or perishable products manufactured from perishable property of a

character embraced within section 303(b) (6) of this title, and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(2) where the motor vehicle so to be used is one which has completed a movement covered by section 303(b) (6) of this title and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.

Feb. 4, 1887, c. 104, Pt. II, § 204, as added Aug. 9, 1935, c. 498, 49 Stat. 546, and amended June 29, 1938, c. 811, § 4, 52 Stat. 1237; Sept. 18, 1940, c. 722, Title I, §§ 19, 20(a, b), 54 Stat. 921, 922; Mar. 27, 1942, 3 p.m., E.W.T., c. 199, Title I, § 101, 56 Stat. 176; Aug. 3, 1956, c. 905, § 2, 70 Stat. 958; Aug. 3, 1956, c. 928, 70 Stat. 983.

§ 202. Congressional finding and declaration of policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, c. 736, § 2, 63 Stat. 910.

SUPREME COURT U. S.

AUG 11 1967

JOHN F. DAVIS, CLE

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 414

TOM S. BUMGARNER, *et al.*,
Petitioners,

VERSUS

JOE BROWN COMPANY, INC., a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH, CE 8-0030

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Certiorari should be denied. Petitioners contend that the case was unripe for summary judgment and that *Morris* v. *McComb*, 332 U.S. 422 (1947), which the District Court and Court of Appeals deemed controlling, was distinguishable and itself *incorrectly decided*. Both contentions are insupportable on their merits and neither contention involves any special or important reason for review as contemplated in Rule 19 of this Court.

STATUTES INVOLVED

Section 7 of the Fair Labor Standards Act requires employers to pay employees one and one-half times their regular hourly rates for hours worked in excess of forty (40) per week. 29 U.S.C. § 207.

Section 13(b)(1) of the same Act, however, provides that Section 7 shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the Motor Carrier Act, 49 U.S.C. § 304. 29 U.S.C. § 213(b)(1). Such employees are referred to as "exempt employees."

Employers are not required to pay exempt employees at more than their regular rates for hours worked in excess of forty (40) per week.

In *Morris v. McComb*, 332 U.S. 422, 423-424 (1947), it was held that the Interstate Commerce Commission had the power:

> "* * * to establish qualifications and maximum hours of service with respect to drivers and mechanics employed full time, as such, by a common carrier by motor vehicle, when the services rendered, through such employees, by such carrier, *in interstate commerce*, are distributed generally throughout the year, constitute 3% to 4% of the carrier's total carrier services, and the performance of such services is shared indiscriminately among such employees and mingled with their performance of other like services for such carrier *not in interstate commerce*."

It was further held that:

> "* * * the overtime requirements of Section 7 of the Fair Labor Standards Act therefore do not apply to such employees."

ARGUMENT

Proposition I

There was no genuine issue of fact.

The facts bringing this case squarely within the control of *Morris* v. *McComb* were established by competent sworn statements supporting the motion for summary judgment in the District Court (R. 4, 13, 17), which were summarized by the District Court (R. 14-15) and by the Court of Appeals in 376 F.2d at 750. The only opposing affidavit was made by petitioners' counsel. Excluding only formal parts, this affidavit read as follows (R. 11):

> "I oppose the motion of defendant, and do not believe the statements of facts made in defendant's affidavit in support of said motion to be true.
>
> "By reason of the fact that neither I nor the plaintiffs whom I represent, have any access to the records of the defendant, I cannot of my own knowledge present by this affidavit facts essential to justify my opposition."

The Court of Appeals held this counter-affidavit insufficient to dispute the factual allegations contained in respondents' supporting affidavit. In addition to the authorities cited by that Court, its conclusion on this point is supported by *Zaidan* v. *Borg-Warner Corporation,* 341 F.2d 391, 393 (3rd Cir. 1965); *Internat'l Longshoremen* v. *Kuntz,* 334 F.2d 165 (9th Cir. 1964); *Wilson Jones Co.* v. *Gilbert & Bennett Mfg. Co.,* 332 F.2d 216, 219 (2d Cir. 1964); *Engl* v. *Aetna Life Ins. Co.,* 139 F.2d 469, 472-473 (2d Cir. 1943); *Belinsky* v. *Twentieth Restaurant, Inc.,* 207 F.Supp. 412 (D.C.S.D.N.Y. 1962); *Long Island Railroad Co.* v. *New York Central Railroad Co.,* 197 F.Supp. 21 (D.C.E.D.N.Y. 1961).

Nothing in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1961), upon which petitioners rely, is to the contrary. It holds that summary judgment should not be allowed where the truth is not quite clear and that summary procedures should be used sparingly in complex antitrust litigation.

Proposition II

A. Morris v. McComb is not distinguishable from this case.

The Court of Appeals regarded the present case and *Morris* v. *McComb* as having "almost identical factual background(s)." Petitioners attempt to distinguish *Morris* v. *McComb* as applicable only to *individual drivers* engaged in interstate commerce. Individual interstate commerce activity was not shown as to the individual petitioners here only the percentage of respondent's revenue from interstate commerce as a common carrier was shown. *Morris* v. *McComb* was based on a percentage of the employer's revenue (332 U.S. at 427), the drivers' *average* interstate activity was considered (332 U.S. at 431), and two of the individual drivers there held exempt had made *no trips* in interstate commerce (332 U.S. at 431-432, 440).

B. Morris v. McComb was correctly decided.

In support of their contention that *Morris* v. *McComb* was incorrectly decided, petitioners cite the dissent of Mr. Justice Murphy therein and *United States* v. *American Trucking Ass'ns*, 310 U.S. 534 (1940).

The dissenting views expressed in *Morris* v. *McComb* were rejected by the majority of the Court in that case.

Petitioners advance no special or important reasons for the Court to reconsider that rejection.

United States v. *American Trucking Ass'ns* holds that the Interstate Commerce Commission's regulatory power is limited to those employees whose activities affect safety of operation of motor vehicles engaged in interstate commerce. Truck drivers' activities affect safety of operation. *Morris* v. *McComb.* Petitioners were truck drivers (R. 7, 14). They were therefore within the Commission's regulatory power as limited by the *American Trucking* decision.

A. H. Phillips, Inc. v. *Walling,* 324 U.S. 490 (1945), and the Court of Appeals decisions cited by petitioners are authority for narrow construction of exemptions from the Fair Labor Standards Act, but none of them has anything to do with the particular exemption here considered.

Petitioners contend that the decision in *Morris* v. *McComb* is contrary to the intent of Congress in enacting the Fair Labor Standards Act, citing in support of this contention only Mr. Justice Murphy's dissenting opinion therein. *Morris* v. *McComb* was decided almost 20 years ago. In that time the Congress has enacted many amendments to the Fair Labor Standards Act but has not amended Section 13(b)(1), which states the exemption construed adversely to petitioners in *Morris* v. *McComb.*

Such inaction by Congress indicates legislative approval of the Court's construction of the Act. *United States* v. *Elgin, J. & E. R. Co.,* 298 U.S. 492, 499-501 (1935). When questions are of statutory construction, not of constitutional import, Congress can rectify any mistaken interpretation by the Court, and if Congress has not seen fit to do so, the

Court should not readily reverse its original interpretation. *United States* v. *South Buffalo Ry. Co.*, 333 U.S. 771, 774-775 (1948). It cannot be said that this Court *must follow* its own prior statutory interpretation unless Congress amends the statute. See dissenting opinion in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 74 (1955). But when a question of statutory construction is presented it must be viewed in the light of prior holdings which have been left unchanged by Congress. See *Reed* v. *Steamship Yaka*, 373 U.S. 410, 414 (1963); *Toolson* v. *New York Yankess*, 346 U.S. 356 (1953).

CONCLUSION

The petition here presents no unsettled question, but one which was settled by this Court almost 20 years ago in *Morris* v. *McComb*, 332 U.S. 422 (1947). That controlling decision of this Court is indistinguishable from the present case, and it was applied properly by the Court of Appeals and District Court. Petitioners have advanced no reason warranting review of the earlier decision. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August, 1967